Supreme Court, U.S.
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No. 79-1738

# In the Supreme Court of the United States

OCTOBER TERM, 1979

RICHARD NIXON, PETITIONER

*v.*

A. ERNEST FITZGERALD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR RESPONDENTS ALEXANDER BUTTERFIELD AND BRYCE HARLOW

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

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This is an action brought by respondent A. Ernest Fitzgerald to obtain monetary damages from petitioner Richard Nixon and respondents Alexander Butterfield and Bryce Harlow. Fitzgerald alleges that these individuals engaged in a conspiracy with "knowing intent to terminate [his] employment with the Air Force and to prevent his reinstatement as a government employee in retaliation for his congressional testimony" (Pet. App. 2a), in violation of the First Amendment, 5 U.S.C. (Supp. II) 7211 (Pet. App. 11a), and 18 U.S.C. 1505 (Pet. App. 11a-12a).[1] He seeks damages for the loss of his Air Force

[1]Fitzgerald has abandoned his other asserted bases for relief, including the Fifth Amendment (Pet. App. 4a) and District of Columbia common law (see Respondent Fitzgerald's Supplemental Brief 2).

position and the impairment of his future employment prospects.[2]

Petitioner Nixon moved for summary judgment on the ground that he was absolutely immune from damage suits arising out of his activities as President. Respondents Butterfield and Harlow also claimed an absolute immunity from suit as presidential advisors acting on behalf of the President. Relying on *Butz* v. *Economou*, 438 U.S. 478 (1978), and *Halperin* v. *Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), the district court rejected the absolute immunity defense and set the case for trial (Pet. App. 2a-3a, 5a).

Petitioner Nixon and respondents Butterfield and Harlow immediately appealed the denial of their claim of absolute immunity. On April 30, 1980, a motions panel of the court of appeals summarily granted Fitzgerald's motion to dismiss the appeals (Pet. App. 35a-36a). Petitioner Nixon has now sought review in this Court. Respondents Butterfield and Harlow have petitioned for rehearing, with a suggestion for rehearing en banc, in the court of appeals, which petition is still pending.

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[2]Fitzgerald originally pursued his administrative remedies before the Civil Service Commission. The Commission found that his termination, although not prompted by his congressional testimony, had been based on other impermissible factors. Accordingly, the Commission ordered reinstatement and back pay. Apparently believing that such relief was not fully adequate, Fitzgerald then commenced the instant litigation. See, *e.g.*, *Fitzgerald* v. *Staats*, 578 F. 2d 435, 436-437 (D.C. Cir.), cert. denied, 439 U.S. 1004 (1978); *Fitzgerald* v. *United States Civil Service Commission*, 554 F.2d 1186, 1187-1188 (D.C. Cir. 1977); *Fitzgerald* v. *Seamans*, 553 F.2d 220, 222-223 (D.C. Cir. 1977).

This Court has recently granted certiorari in *Kissinger* v. *Halperin*, No. 79-880 (May 19, 1980), to review the decision of the court of appeals upon which the district court relied in rejecting the claim of absolute immunity in the instant case.[3] Because *Kissinger*, like the present case, involves the question whether the President and his advisors should be absolutely immune from suits for money damages arising out of their official duties, the

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[3]The district court has postponed the trial of this action pending this Court's decision in *Kissinger*.

Fitzgerald asserts (Br. in Opp. 8) that the defense of absolute immunity is limited to his constitutional claims and is inapplicable to the implied causes of action based on federal statutes. But petitioner correctly points out (Reply Br. 4 n.1) that the petition raises the issue of absolute immunity as a defense to all of Fitzgerald's theories of liability. As we explained in our Reply Memorandum in *Kissinger* (pages 1-2), "if, as we submit, the President (and his closest advisors) are entitled to immunity from damages liability for decisions made in the exercise of the President's official responsibilities under Article II of the Constitution, that immunity could serve as a defense to statutory as well as constitutional causes of action."

Court should hold this petition and dispose of it in light of the decision in *Kissinger*.[4]

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

JUNE 1980

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[4]We note that other petitions raising this immunity issue are apparently being held pending decision in *Kissinger*. See *Mitchell* v. *Zweibon*, No. 79-881 (filed Dec. 7, 1979); *Nixon* v. *Smith*, No. 79-882 (filed Dec. 7, 1979); *Mitchell* v. *Forsyth*, No. 79-1120 (filed Jan. 18, 1980).

In addition to the immunity issue, this case also presents the question whether a pretrial rejection of the defense of absolute immunity is immediately appealable under 28 U.S.C. 1291. However, as Fitzgerald recognizes (Br. in Opp. 2 n.1), the question of appealability is closely related to the merits of the immunity claim. See also *Helstoski* v. *Meanor*, 442 U.S. 500 (1979); *Abney* v. *United States*, 431 U.S. 651 (1977); *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1207-1209 (3d Cir. 1979), petition for cert. pending, No. 79-1120 (filed Jan. 18, 1980); *McSurely* v. *McClellan*, 521 F.2d 1024, 1032 (D.C. Cir. 1975), aff'd in pertinent part, 553 F. 2d 1277, 1283-1284 n.18 (1976), cert. dismissed, 438 U.S. 189 (1978). Accordingly, the appealability issue should also be disposed of in light of the decision in *Kissinger*. We note, moreover, that this issue is currently before the court of appeals on the rehearing petition filed by respondents Butterfield and Harlow.

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